Supreme Court, U.S.
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No. 83-52

In The

Supreme Court of the United States

October Term, 1983

GERALD F. TAYLOR and DELORES TAYLOR,
Petitioners,

vs.

ROBERT A. DIXON and THE LAWSON COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT THE LAWSON COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

THOMAS A. YOUNG
PORTER, WRIGHT, MORRIS & ARTHUR
37 West Broad Street
Columbus, Ohio 43215
(614) 227-2137
Counsel of Record for Respondent The Lawson Company

OF COUNSEL:
MASON EVANS, IV
MICHAEL J. ROURKE
PORTER, WRIGHT, MORRIS & ARTHUR
37 West Broad Street
Columbus, Ohio 43215
(614) 227-2000

PARTIES TO THIS PROCEEDING

This case arises out of the shooting of petitioner Gerald F. Taylor by Robert A. Dixon. At the time of the shooting, Robert A. Dixon was robbing a retail convenience food store owned by respondent The Lawson Company (incorrectly referred to by petitioners Gerald F. Taylor and Delores Taylor as "The Lawson Milk Company"). The civil lawsuit instituted by petitioners Gerald F. Taylor and Delores Taylor in the Franklin County, Ohio Court of Common Pleas named both Robert A. Dixon and respondent The Lawson Company as defendants.

Robert A. Dixon did not enter an appearance at any time in this litigation, either at the trial level or the appellate level. Therefore, Robert A. Dixon is not a party to the proceeding presently before this Court, even though the cover of the "Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio" indicates otherwise. The sole respondent in the proceeding presently before this Court is The Lawson Company.

Pursuant to Rule 28.1 of this Court's Rules of Practice, respondent The Lawson Company hereby informs this Court that its parent corporation is Consolidated Foods Corporation.

TABLE OF CONTENTS

	Pages
Parties To This Proceeding	i
Table Of Authorities	ii
Statement Of The Case	1
Summary Of Argument	3
Argument:	
I. Neither The Seventh Nor The Fourteenth Amendments To The Federal Constitution Prohibits A State Court From Rendering Summary Judgment In A Negligence Case In Which There Are No Genuine Issues Of Fact As To A Determinative Issue.	5
II. Petitioners Have Failed To Raise In A Timely Manner The Alleged Federal Question In This Case.	7
Conclusion	10

TABLE OF AUTHORITIES

CASES

American Surety Co. v. Baldwin, 287 U.S. 156 (1932) 4, 10

Butler v. Acme Markets, Inc., 89 N.J. 270, 445 A.2d 1141 (1982) 7

Diamond Door Co. v. Lane-Stanton Lumber Co., 505 F.2d 1199 (9th Cir. 1974) 6

Edelman v. California, 344 U.S. 357 (1953) 8

TABLE OF AUTHORITIES—Continued

Pages

Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315 (1902) 6

Miree v. DeKalb County, 433 U.S. 25 (1977) 7

Oglesby v. Terminal Transport Co., Inc., 543 F. 2d 1111 (5th Cir. 1976) 6

Olesen v. Trust Co. of Chicago, 245 F. 2d 522 (7th Cir.), *cert. denied*, 355 U.S. 896 (1957) 6

Stamper v. Parr-Ruckman Home Town Motor Sales, Inc., 25 Ohio St. 2d 1, 265 N.E. 2d 785 (1971) 6

United States v. Stangland, 242 F. 2d 843 (7th Cir. 1957) 6

CONSTITUTIONAL PROVISIONS

Seventh Amendment to the United States Constitution 3, 4, 5, 6, 10

Article IV, Section 2 (B) (2) (d) of the Ohio Constitution 9

STATUTE

28 U.S.C. Section 1257 7

RULES OF PRACTICE

Rule 21.1 (h) of the Rules of Practice of the Supreme Court of the United States 8

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STATEMENT OF THE CASE

In the interest of brevity, respondent The Lawson Company ("respondent") will not submit a separate state of the case. Respondent does, however, feel compelled to clarify a number of omissions and one misstatement contained in the statement of the case submitted by petitioners Gerald F. Taylor and Delores Taylor (hereinafter jointly referred to as "petitioners").

First, petitioners pointed out that it was undisputed that the Lawson store (hereinafter referred to as "the store" or as the "Parsons Avenue Lawson store") located at 3495 Parsons Avenue, Columbus, Ohio, was robbed seven times in the more than four-year period between April

1975—when it opened—and June 28, 1979—the date petitioner Gerald F. Taylor ("petitioner Taylor") was shot. However, petitioners failed to disclose that most of these prior robberies occurred in the darkness of evening or very early in the morning (5:00 a. m. or earlier). Petitioner Taylor, on the other hand, was shot at noon time, on a bright, sunny summer day.

Second, petitioners failed to point out that no customer was ever wounded or injured in any of the prior robberies.

Third, petitioners did not disclose that on the day petitioner Taylor was shot, a number of measures designed to deter robberies were in effect at the store. These measures included keeping the windows and glass doors of the store reasonably unobstructed so as to allow a clear view into and out of the store; placing the customer counter and cash registers at the front of the store, close to the windows and doors; installing a surveillance camera behind and above the customer counter and cash registers; placing decals on the doors informing potential criminals that "THIS BUILDING IS PROTECTED BY ELECTRONIC SURVEILLANCE EQUIPMENT"; and keeping the interior of the store brightly lighted.

Fourth, petitioners did not inform this Court that at the time of the Dixon robbery, respondent had in effect at the store the only sensible policy available to minimize the possibility of injury to customers or employees during a robbery: an express, written policy that all Lawson employees were to cooperate fully with the robber and do nothing to provoke him. It was undisputed that this policy was scrupulously adhered to during the Dixon robbery.

Fifth, petitioners did not mention that Robert A. Dixon, the criminal who shot petitioner Taylor while Dixon was robbing the store, stated in an affidavit submitted to the trial court in support of respondent's motion for summary judgment that immediately prior to the robbery, he had taken a large number of drugs; that during the robbery he was under the influence of these drugs; that there was no specific reason why he chose the Parsons Avenue Lawson store to rob, as opposed to other stores in the area; and that none of the Lawson employees in the store during the robbery resisted his demands or provoked him in any way.

Finally, petitioners' statement of the case and their brief in support of their request for a writ of certiorari erroneously informed this Court that despite the prior robberies at the store, respondent admitted that it took no additional security measures to deter future robberies at that store. There simply was no such admission at any point in this case.

SUMMARY OF ARGUMENT

1. Even assuming that the seventh amendment to the United States Constitution applies to actions in state courts, neither that amendment nor the fourteenth amendment to the federal Constitution prohibits the disposition of lawsuits by summary judgment. If there are no issues of fact on any one determinative issue in a civil case, summary judgment is appropriate and is not barred by the seventh amendment.

In a negligence action brought in an Ohio state court, the existence of a duty owed by the defendant to the plaintiff is a determinative issue. In the present case, there were no factual issues relative to the issue of respondent's duty to protect petitioners from the violent, unprovoked, criminal assault of a third person. The seventh amendment, therefore, did not prohibit the disposition of this case by summary judgment.

2. In order to invoke this Court's jurisdiction to review a state court decision, the alleged federal question in the state court proceeding must be raised in a timely manner. In the present case, petitioners failed to raise before the Ohio trial court, before the intermediate Ohio court of appeals, or before the Supreme Court of Ohio in their "Motion To Certify The Record", any issue concerning a violation of their federal constitutional rights. The first time such an issue was raised by petitioners was in their last document filed in state court—petitioners' application to the Supreme Court of Ohio to reconsider its overruling of their "Motion To Certify The Record." This Court has expressly held that an alleged federal question which is first presented to a state court in an application for rehearing before that state's supreme court is not seasonably raised, and raising the federal question at that late stage will not preserve the issue for review by this Court. *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932).

ARGUMENT

I. Neither The Seventh Nor The Fourteenth Amendments To The Federal Constitution Prohibits A State Court From Rendering Summary Judgment In A Negligence Case In Which There Are No Genuine Issues Of Fact As To A Determinative Issue.

The sole question presented in the petition in this case is stated as follows by the petitioners:

> Whether a series of seven (7) armed robberies at the same business location within a span of four (4) years constitutes a sufficient notice to the business occupier requiring additional safety measures to be undertaken to deter an eighth (8th) armed robbery and, if no additional safety measures are under taken, does plaintiff state a cause of action in negligence to warrant a trial on the merits as required by the Seventh and Fourteenth Amendments to the United States Constitution.

It is clear from this statement of the question presented that petitioners are arguing that this Court should sit as a "super state supreme court" to determine whether a certain set of undisputed facts constitutes a negligence claim in a state court action, which action, by virtue of the seventh and fourteenth amendments to the federal Constitution, cannot be disposed of by summary judgment. A review of relevant case law discloses that petitioners' argument is utterly without foundation.

The seventh amendment provides, in part, that: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." Petitioners' argument assumes that the seventh amendment to the United States Constitution is applicable to state court actions by virtue of the four-

teenth amendment's due process clause. This assumption is erroneous. *Olesen v. Trust Co. of Chicago*, 245 F. 2d 522 (7th Cir.), *cert. denied*, 355 U. S. 896 (1957).

Even ignoring petitioners' incorrect assumption, a number of cases have held that the granting of summary judgment, where there are no disputed issues of facts on a determinative issue, does not deprive the party against whom the summary judgment was entered of his seventh amendment right to a trial. *Fidelity & Deposit Co. of Maryland v. United States*, 187 U. S. 315 (1902); *Oglesby v. Terminal Transport Co., Inc.*, 543 F. 2d 1111 (5th Cir. 1976); *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F. 2d 1199 (9th Cir. 1974); *United States v. Stangland*, 242 F. 2d 843 (7th Cir. 1957). The rationale underlying these holdings is that a trial is only required if there are disputed issues of fact; if on any determinative issue in a case there are no factual questions, no trial is required.

In a negligence case brought in an Ohio state court, the existence of a duty on the part of the defendant to the plaintiff is a determinative issue. *Stamper v. Parr-Ruckman Home Town Motor Sales, Inc.*, 25 Ohio St. 2d 1, 265 N. E. 2d 785 (1971). In the present case, petitioners contended that respondent owed to them a duty to take precautions to prevent customers in the store from being injured by the violent, unprovoked, criminal acts of a third party. The sole factual basis upon which petitioners premised this alleged duty was the seven prior robberies at the store. The prior robberies were not disputed by respondent, and hence this action was particularly suited for disposition by summary judgment on the issue of respondent's alleged duty to petitioners.

There is no uniform federal common law which applies to tort claims between individuals brought in state court. *Cf. Miree v. DeKalb County*, 433 U.S. 25 (1977). Therefore, the decisions from other states concerning the issue of duty in a negligence action—such as the case of *Butler v. Acme Markets, Inc.*, 89 N.J. 270, 445 A.2d 1141 (1982), a case cited by petitioners before this Court—are not germane to an issue concerning federal constitutional rights. Although *Butler* is factually distinguishable from the present case, a decision of a New Jersey state court in a negligence action can have no relevance in determining whether petitioners, as a matter of federal constitutional law, have a right to have their case submitted to an Ohio jury. Such a right simply does not exist.

II. Petitioners Have Failed To Raise In A Timely Manner The Alleged Federal Question In This Case.

28 U.S.C. Section 1257, the statute controlling this Court's jurisdiction to review decisions rendered by state courts, provides, in part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statues of, or commission held or authority exercised under, the United States.

It is settled law that if the alleged violation of federal constitutional rights is not seasonably presented at the state court level, this Court is without power to decide whether such a violation occurred. *E. g., Edelman v. California*, 344 U. S. 357 (1953).

The principle that federal questions must be seasonably raised in state court in order to allow this Court to review the final decision of the state court proceeding is also codified in this Court's Rules of Practice. Rule 21.1 (h) states:

> (h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

Petitioners have failed to comply with Rule 21.1 (h). The reason for such failure is clear: petiitoners did not seasonably raise in the Ohio state courts the alleged federal question they now wish this Court to consider.

The "Decision" of the trial court sustaining respondent's motion for summary judgment was rendered January 22, 1982. At this point in the proceedings, at the very latest, petitioners had to be aware of the alleged federal question which they now claim before this Court.

However, neither petitioners' "Motion for Reconsideration" filed in the trial court on January 25, 1982, nor their amended complaint filed the same day, mentioned any alleged federal constitutional issues raised by the granting of respondent's motion for summary judgment.

Similarly, petitioners failed to raise in their appeal to the Ohio Tenth District Court of Appeals any issue of violation of federal constitutional rights.

Petitioners' final recourse in the Ohio state courts was an attempt to have the Supreme Court of Ohio certify the record in this case and render a decision on the merits of the granting of summary judgment. Such a proceeding requires that the Supreme Court of Ohio first find that the case was one of public or great general interest: in other words, this proceeding was a discretionary appeal process. Article IV, Section 2 (B) (2) (d). In their "Motion To Certify The Record" filed in the Supreme Court of Ohio, petitioners once again totally failed to raise any federal question.

On April 13, 1983, the Supreme Court of Ohio overruled petitioners' "Motion To Certify The Record." On April 26, 1983, petitioners filed in the Supreme Court of Ohio an "Application For Reconsideration Of Appellants' Motion For An Order Directing The Court Of Appeals For Franklin County To Certify Its Record." The alleged federal constitutional violation now asserted by petitioners was first raised below in that application, which was petitioners' last possible remedy in the Ohio state courts. On May 18, 1983, the Supreme Court of Ohio overruled that application.

It is clear that petitioners have failed to raise in a timely manner in the state court proceedings the alleged federal constitutional issues now presented to this Court. This Court has expressly held that an alleged federal constitutional issue which is raised for the first time in an application for rehearing in a state supreme court is not seasonably raised, and therefore raising the federal question at that late stage will not serve as a basis of review by the Supreme Court of the United States. *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932).

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CONCLUSION

Neither the seventh nor the fourteenth amendments to the United States Constitution prohibits the rendition of summary judgment in a civil case in which there are no questions of fact as to any one determinative issue. In the present negligence case, there were no questions of fact concerning the issue of respondent's duty to protect petitioners from the violent, unprovoked, criminal assault of a third party. Because the issue of respondent's duty was a determinative issue in this case, summary judgment was properly entered. This Court does not sit as a "super state supreme court" to determine that as a matter of federal constitutional law, a certain set of undisputed facts creates a jury issue in a negligence action brought in state court.

Additionally, petitioners have clearly failed to raise in a timely manner in the state court proceedings the alleged federal question which they now advance in this Court.

For these reasons, the "Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio" should be denied.

Respectfully submitted,

THOMAS A. YOUNG
PORTER, WRIGHT, MORRIS & ARTHUR

37 West Broad Street
Columbus, Ohio 43215
(614) 227-2137

Counsel of Record for Respondent
The Lawson Company

OF COUNSEL:

MASON EVANS, IV
MICHAEL J. ROURKE
PORTER, WRIGHT, MORRIS & ARTHUR

37 West Broad Street
Columbus, Ohio 43215
(614) 227-2000